III.

AN OFFICIAL TRIAL BAR.

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I.

When lawyers, not alone of the "radical" view point of Mr. Gray, but also those of conservative views concede that there are grave evils in our legal systems and their administration, the existence of such evils may be assumed. Dropping the old systems of common law and equity pleadings, and codifying those methods of pleading and procedure which seem to produce the greatest efficiency into statutory rules as few and simple as possible—placing the formulation and change of rules on these subjects in the power of the bench—the settlement of pleadings and motions by masters, or by any member of the bar as referee—the upholding of judgments despite error, where substantial justice appears to have been done—the appointment of judges, or their election for long terms subject to or free of the recall, and sitting only in certain branches of the law, so that they may acquire expertness in those branches—these and other expedients, to be patched on our present systems by our legislatures, have been proposed. Mr. Albert M. Kales has very ably shown[2] why all such reforms will not bring in this country the excellent conditions prevailing in England, without a thorough organization of the courts on an efficiency basis and especially a division of our bar into office practitioners and trial specialists such as prevails there. To quote him:

The remedies implied by Mr. Kales' criticisms, or those by Mr.

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[1]Member of the Chicago Bar.

[2]*Illinois Law Review*, Vol. 4, p. 303, at p. 324.

"For instance, how futile it would be for us to attempt to adopt the practice of oral instructions to juries. Our system of written instructions is admirably adapted to a fifth-rate system of judicial organization and administration such as we have. It is admirably adapted to a practice in court which is free to all, however inexpert in the handling of litigated cases, or however much they may be given over to business entirely unconnected with the courts. It is well adapted to the powers of judges who never attained pre-eminence as advocates during twenty years of practice in the courts where they are called upon to preside as judges. On the other hand, an oral charge, and exceptions to it in the presence of the jury upon its conclusion, are adapted to a system where the judge has become an expert in the trial of cases by jury from long practice as an advocate at the bar, and where many years of arduous training and experience in dealing with charges to juries has given him a perfect familiarity with the proper instructions to be presented, as well as powers of expression and force in their delivery. In the same way, the taking of exceptions to oral instructions immediately at the close of the charge is adapted to a very

Alger,[3] are more fundamental than the others mentioned. But they are not fundamental enough to reach the real cause. Why?

The law is considered one of the learned professions. The practice of a learned profession requires not only learning, but the uncompromising ideal of the scientific investigator in the service of the truth. But every one knows this ideal exists only in theory. Especially within the few hundred years past, since science has ushered in the so-called "commercial era," the practice of law is a business. The ordinary saying, "he is in the law business," has a very decided basis in reality. The object of "the law business," as of every other business, is to "get results." In practical life, that object is to convert into fees as large a volume as possible of all kinds of legal or quasi-legal transactions or law suits. And the lawyer soon finds that in accomplishing this object, it is not so important to promote justice as to win cases—which may mean an entirely different thing. Soon this tendency, to use the machinery of the law primarily "to get results" for himself by winning cases, becomes unconscious, the while it becomes more fixed.

It is true that the lack of organization of our courts and division of our bar into solicitors and barristers, results in a lack of specialization in bench and bar and that this in turn helps to cause unskillful, slipshod work and errors and delay in litigation, clogging of the trial calendars, overworked and bewildered judges, decisions of cases on technicalities,[4] and a torrent of appeals and authorities which makes a joke of certainty in the law, as Mr. Kales has pointed out. But when you have established that desired organization of the courts and division of

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expert bar. How absurd, then, it is to consider incorporating into the practice of this State oral instructions and immediate exceptions thereto, before any steps are taken to organize the bar so that court practice will be in the hands of men who devote themselves to that as a profession, and from the leaders of whom our judges may be selected. The result of giving our judges power to instruct the jury orally and requiring counsel to take exceptions immediately upon the close of the charge, would, I should think, result in great opportunity for injustice to individual litigants, either in very poor instructions, or else in the present practice of written instructions being substantially continued."

[3]"Swift and Cheap Justice," by George W. Alger, a series of articles beginning in *The World's Work* for October, 1913.

[4]Many members of the profession are so hidebound as to deny that there may ever be an improper decision based on technicalities, on the ground that there is a good reason for every technicality. By a decision on technicality, I mean, a case where the record permits only a decision based upon certain rules, themselves well established and perfectly logical, yet where the application of these rules practically produces an inequitable result. A good illustration of this class of cases would be that of a judgment preserved in an abbreviated form and abbreviated words permissible under a Rule of the Municipal Court of Chicago since its institution, explaining the abbreviated words and which rule was passed in pursuance of a provision in the Act establishing the Court which permitted abbreviated forms of judgment orders. To an execution on such a judgment, the defendant files a schedule. After a creditor's bill has

the bar, yet would not that unconscious tendency, fixed in the bar by the social and economic environment and reflected from the bar to the bench, still be at work, overcoming the beneficial tendencies of those reforms? To the writer, it seems emphatically, yes.

Now, lawyers are not to be blamed for seeking personal success, according to prevailing standards; however, such activity may differ from their professions of their aims. That is human—all too human. Mr. Gray has well summed up the situation in his contribution to this symposium, as follows: "Courts are no more responsible for the condition concerned than attorneys, and courts and attorneys combined are no more responsible for that condition than clients. And courts and attorneys and clients combined are no more responsible for that condition than the people at large." The responsibility of the people at large, being fundamentally an economic question, is outside the scope of this paper. But the basis of responsibility of clients is pertinent. Mr. Gray pointedly explains it in these words: "The average client knows what he expects from his own lawyer—everything and anything to win the case; and yet when that lawyer is not his own lawyer, he blames him for doing the very things which he expects him to do when hired by him as his own paid fighter."

The immediate cause of the tendency in the bar which has been referred to is, then, *the present system* of *private pay by clients;* and until human development reaches the point at which material possessions are no longer a standard of success, when, it is to be noted, also the amount of litigation will be negligible, the remedy would seem to be a *public,* paid, *trial bar,* at least.

To quote Mr. Gray again: "It is certainly true that legislation cannot create moral force, just as Spencer notes that 'It is impossible for man to create force.' But he can 'alter the modes of its manifestation, its direction, its distribution.' It is hardly common sense to turn a bull into a chinashop or a rattlesnake into a nursery." If you remove the factor of personal gain through reputation and fees, there will be

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been brought to enforce this judgment and a decree has passed for the creditor, thus showing his fraud in scheduling, the Supreme Court of Illinois, in another case, declares that the abbreviated words permitted by the Rule, are not "the English language" within the meaning of a constitutional provision requiring "the English language" in judicial proceedings, and hence the above mentioned judgment and all others like it are null and void. The judgment against the debtor being void from the beginning under this decision, it is submitted that most likely the debtor could overthrow the decree against him upon the creditor's bill, even though he knew the meaning of the abbreviated words so well that he filed a schedule against it.

An excellent illustration of such technicality is found in the comment by J. H. W. (John H. Wigmore) on the case of *Walters v. Ottawa,* 220 Ill., in *The Illinois Law Review* for December, 1909 (Vol. IV, p. 349).

set to work another tendency, just as human as the present tendency of lawyers to win their cases rather than promote justice—namely, the tendency for each lawyer in a case to see to it that nothing but the strictest justice is done in the case. For there will then be no other way for him to gain the case.

The more one pictures this system of a public paid trial bar the more natural (by which I mean, in harmony with the theories of other institutions as they are) does it appear to be. In addition to Mr. Gray's cogent argument for it, the following argument may be advanced: The state itself prosecutes crime, because it is supposed that otherwise, private reprisal by the injured party and his friends against the criminal and the latter's counter reprisal, would destroy all order. But, in the first place, on this theory, why is it not just as important for the state to *defend* the accused as well as to *prosecute* him, lest a first reprisal against the accuser or the state itself, come from one who thinks he has been or perhaps has really been unjustly punished, on account of the aid of the state to the prosecution alone? The doing of equal and exact justice would thus seem to require the state both to prosecute and to defend in criminal cases.

But again, the danger of the destruction of public order by reprisal growing out of so-called civil injuries is just as great as in the case of crimes. Thus, if the existence of the state is potentially at stake in all classes of controversies (whatever our arbitrary classification of them may now be), its interest in each class of cause must be equally great. Why, then, should the state permit a private industry to exist in the administration of civil law and in the defense of crime, while engaging in the prosecution of crime itself? The proper interests of the state would seem to require it to settle private controversies and defend criminal prosecutions by its own agents, rather than to abdicate its present function of prosecuting crime. Why has it not sooner occurred to observers than (as Mr. Gray says) "To permit any one to bring his hired man into court to try his case is equally absurd, if truth and justice are really the objects of the trial." If a visitor from Mars or some other planet, where affairs are supposed to be perfectly ordered, came down to earth, free, as he would be, of a hereditary or educated prejudice for things as they are, one of the first institutions to strike him as absurd on its face must be the exercise of such a public function as the administration of justice by a privately paid bar.

In a letter to Mr. Gray, Mr. Herbert Harley, a keen observer, and secretary of the American Judicature Society, makes the following statement:

"I want to admit the premises upon which you base your proposals. I also

want to admit that what you propose would accomplish what you hope to accomplish. But I would suggest, very modestly (for nobody can with any safety forecast the future), that a bureaucratic advocacy would in time defeat the profession of law, in its usefulness to the public, in respect to the one function in which it has perhaps been most potent—that of working out case-law in the crucible of contention. We have let countless litigants suffer, but we have achieved a wonderful machine for developing the American common law. I think, as you do, that we have paid too much, and are paying too much, for this development; but it is to be considered with reference to any proposal looking to alteration of the relationship of the component parts of the great machine which exists to adjudicate causes."

The results of this "crucible of contention" are stated by Mr. Kales in the article referred to, as follows: "We are beginning to hear it charged against the law that nobody knows what it is. The proper conduct necessary to keep out of jail, or to avoid the payment of ruinous fine or damages, is in many important instances not known and not knowable with any precision. That is the criticism that is being made today, not by laymen alone, but by lawyers themselves—for instance, by Everett V. Abbot, of the New York Bar, in a recent number of the *Outlook*." Every course of human conduct can be properly based upon the theory of avoidance of the greater evil. From the foregoing it would appear that the countless volumes of case law, resulting, as they have, in the charge referred to by Mr. Kales, are not such a compelling benefit as to overcome the evils of a system that, Mr. Harley admits, has made "countless litigants suffer." Mr. Kales says: "It is submitted that the reason for this ignorance of, and uncertainty concerning, the law is plainly the lack of organization among lawyers which tends to make and retain good traditions in the administration of justice. Its cure or mitigation can be effected most satisfactorily only by the reorganization of the bar suggested."

But Mr. Kales' plan would only *mitigate* the evils (some or all) of the present system, so long as a privately paid bar of advocates remained. For, while not directly spurred by clients to "make the worst appear the better argument," these barristers must still be dependent upon the solicitors who retain and pay them, but who are in turn dependent upon clients, persons of the same mould and under pressure of the same social systems as that existing today. The barristers are still not removed from the agents of their litigants. A public salaried trial bar, by entirely removing both bar and bench from the influence of the demands and pressure of clients, can bring about the greatest freedom to get at the real truth of each cause and the greatest efficiency in doing this. Assuming this proposition, the writer purposes to sketch a plan for the creation and operation of such a trial bar.

II.

Let there be established in each of a certain political division, such

as the county, a bureau of justice. This bureau is to be maintained by taxation and by the income of its operation, derived as afterward shown. Lawyers, upon being admitted to the bar, in so far as their practice in litigation is concerned, become servants or employees of the state only, and paid by the state, out of a fund made up of taxes and the receipts of this bureau. In their character as counsellors outside of litigation or as office attorneys, they may practice just as they do today (though it appears to the writer that the beneficial effects of a public salaried trial bar would in time do away with much of the chicanery of office practice). But in their character as attorneys in litigation, or advocates, they are only public officials. They are under a strict system of civil service, so conducted as to be continually classifying them into specialties, with the result that the highest type of specialized service might be at the disposal of these public bureaus of justice.

Now, suppose that X has a claim against Y, which he thinks he must enforce by legal process. He must resort to the bureau of justice of his county, where the clerk assigns him and his claim to one of the lawyers of the bureau. Let us suppose their controversy falls in the field of corporate law; his case is then assigned to a specialist in corporation law, qualified by civil service. The assignment may be made by a system of rotation—alphabetically, let us say. The lawyer to whom the case is assigned need not take it if he does not want it. And as suggested by Mr. Gray, there should, of course, be some specified grounds for rejection by a client of the trial lawyer so drawn from the box. Also, there should be at least one or more peremptory rejections allowed him.

To the objection readily suggested at this point by frequent discoveries of corruption in our public service today, that the bureaus in charge of this classification of the trial bar, and the assignment of cases to its members would be administered corruptly, the answer is that there is not a whit of reason to believe that the departments of the bureau would be subject to any more corruption than any other department of the public service now existing. The least that may be said for these departments is that they would be no better or worse than existing bureaus or civil service bodies. Yet it is submitted that the average citizen would not permit the abolition of present systems of civil service, or other administrative bureaus, despite more or less evidence of abuses in them. This is so, simply because the good they produce is greater than their evils. The claim of X is investigated by the attorney assigned. If he believes there is a cause of action, he orders process in the nature of summons to issue against Y through the clerical department of the bureau of justice. If he thinks there is no cause of action, he so advises

X, and practically the matter goes no further. Consider that the attorney would have been entirely disinterested, because there is no prospect of a retainer or a fee from X. The giving of such a retainer or a fee could be made a felony, just as today the taking of a bribe by a public official is a felony. What would result? Many of the countless suits upon supposed causes of action which are started today, only to be subsequently thrown out, would, under this plan, never be commenced. Mr. Gray has shown the plausibility of this conclusion. It is only human nature that under all the circumstances this result should follow.

It might be said that if X persisted in demanding a trial of his supposed cause of action against the advice of the attorney, he would have to be given it under the provisions of our constitutions, requiring "due process of law," in the shape of a hearing of his complaint by a legally constituted tribunal. In answer to this contention it might be argued that because the members of a trial bar become, under this plan, officers of the court in every fact as well as merely in theory, which is their status today, the lawyer acting in the above capacity might be readily held to be merely an assistant judge; and just as a court today may non-suit a plaintiff upon a trial, either with or without a jury, and render judgment for costs against such plaintiff, when he concludes that such plaintiff had not at the close of his case in chief and on his own showing made out a case, so this assistant to the judge could non-suit the claimant on his own showing. But should the constitutional objection to this phase of the procedure prove insuperable, the case could proceed as though it had been determined that X had a good cause of action.

Let us suppose, then, the attorney concludes that X has a cause of action. The process above mentioned brings in Y, who will be assigned counsel in the same way as X; or Y may have the same counsel as X, if he wishes him. The counsel convene with the parties and the witnesses, who may be brought in by subpoena, through the clerical department of the bureau, and the issue between the parties decided. The case is thus threshed out between two entirely disinterested civil service specialists in the law governing the controversy.

Here may be heard the objections of many that such a process is too summary and informal to permit of justice. They will talk in glowing terms of the sacred purpose of forms and details, rules of practice and modes of procedure in protecting private rights against despotism or even in civil contests between private litigants. All such rules, forms and precedents were undoubtedly necessary in the dark days when the individual was in a great struggle with arbitrary political power for

supremacy. Practically all of them were developed in legal contests which were admittedly important incidents of that struggle. But in these times, not alone the encroachment, but even the disposition of political despotism to encroach upon the rights of the individual has passed away. It is true, of course, that the industrial despotism which has succeeded the political, is oppressing the individual and that the latter is in a contest with it. But it is to be noted that this contest does not find expression in cases like the public prosecutions wherein those rules were first laid down or vindicated.

And as a matter of practice today, in contests between private litigants—for the most part petty contests—and even in criminal cases, there is not one of them of such importance but that it may not be dispensed with and yet the court reach the very bottom of the controversy safely and deal out justice according to the facts so found. It is, perhaps, a fact that the truth of a case is missed as often as it is found, by the consistent application of those sacred rules. It is certainly a fact that the courts of the countries of Europe are today deciding cases justly and quickly, yet in complete disregard of rules of evidence and procedure considered by us indispensable. It is not a blind adherence to rules and forms under any circumstances, that is necessary. The sane test is, "what will bring to light the truth of a cause under all the circumstances of that particular cause, as they develop in the course of its litigation?" We may safely trust a bench and trial bar, who have become sufficiently impressed with the purpose, effect and history of these rules in their theoretical studies, to know when to dispense with them as well as when to apply them justly, even though informally, so long as their selfish interests do not lie in another direction. It would seem to be a reasonable certainty that the substantial rights of litigants would not be impaired by this system, but that much troublesome and useless litigation clogging the courts today would be avoided.

But the plan contemplates yet another guard against injustice. Under it, courts in the sense of the term today, are by no means to be dispensed with. The place of courts in this plan is as follows: When one of the parties whose case has been passed upon in the bureau is dissatisfied with the outcome, he may take an appeal to a court like our *nisi-prius* court. The "single, certain and material issue," upon which the case has turned in the bureau, is certified to this court by the lawyer-arbitrators who have handled it in the bureau, and only that issue, if of fact, is tried before a court or jury as the parties may desire, or if of law, is heard by the court. The same lawyers who had charge of it below handle it in this court, and would not get fees from the litigants

any more than in the bureau. But before the complaining party may carry the controversy to this court, he must put up a bond covering the costs of handling the matter in the bureau, and for the hearing thereof in the court, such costs being determined as hereinafter suggested. It might be here said that these costs can be so adjusted that their payment would not amount to a denial of justice to the ordinary litigant, and at the same time would be such as to discourage any vexatious appeals and delays.

Before referring again to the bureau, it might be suggested that with the much lessened volume of business the court would be required to try under this plan, an intermediate court of appeals, such as our Appellate Court, would not be at all necessary; and from the decision of this court, there might in certain cases be a direct appeal to a supreme tribunal of the state. The classification of cases in which such appeals may be had, and the form of such appeal, need not be further discussed in this paper, the primary purpose of which is to explain the features of the bureau; but it might be said that even in the Supreme Court, the services of the same lawyers would not be paid for by the litigants, but directly by the state, in connection with a system of costs against the losing party; and the scope of the appeal such as to sift the cases which ultimately come for a decision before this highest tribunal to few in number, and these of great importance, especially public importance. In the organization and methods of operation for these courts as well as for the bureau, the plans for efficiency and specialization suggested by Mr. Kales and Mr. Alger could be adopted without hesitation.

The means of maintaining the bureau may come from the costs paid by litigants for the services of said bureau. These costs may consist of a certain amount paid by a litigant into the bureau for the services of the expert per hour, not including in such services the time spent in advice whether the litigant has a cause of action, but only in the trial or arbitration of the litigation in the bureau, or the courts above it. The bond for appeal to the courts previously mentioned may include the costs of the time according to the number of hours spent in the disposition of the case below. Upon the disposition of a case, the lawyers who have handled it could receive vouchers for their services, the amount of which would be fixed on the reports of the time spent in rendering the same on file in the bureau. These will be correct, as they must be certified and sworn to under penalties. Or, perhaps better, the fee, beyond a certain amount of time spent, may be a gross amount for the case, so as to destroy the incentive of drawing a larger fee by certifying to the greater

number of hours spent in earning it. Such gross fee could be afterwards determined in working out the plan.

Process on judgments could run from the clerical department of this bureau, exactly as it runs from the office of the clerks of the courts today, and any litigated questions arising upon this process would be solved in this bureau in the same manner as original causes.

The most formidable objection, to the mind of a lawyer reading this plan, would be its constitutionality under both the State and Federal Constitutions. In support of its constitutionality, it is to be noted at the outset that the right of the individual to practice law, held to be a property right safeguarded by the various constitutions, is not in the least disturbed by this plan, simply because all office practice and any private consultation practice of any lawyer is not in any way interfered with. But it is submitted that only such private practice of his profession is the extent of the property right thus safeguarded. The lawyer has not any property right in any particular plan of practice or procedure in the courts for the enforcement of legal rights. As to the individual at large, it is to be noted that the plan does not imply a violation of his legal rights, but merely a change in the form of remedy perhaps, and more particularly the means of enforcing that remedy. These means may take any reasonable form, so long as the carrying out of such means falls within the scope of the exercise of the judicial function of government.

If it is to be objected that the disposition of the litigation in the bureau would be the exercise of the judicial function by persons who were not judges, the answer may be made that these lawyer-arbitrators of the bureau are in reality, as well as in theory, servants of the state, or courts. The fact that there were two or more concerned in the disposition of each cause in the bureau seems to the writer to make no difference. It might as well be said that because several judges in each of the upper courts argue an appeal out among themselves before giving their decision, that they are not performing a judicial function. The fact of the informality of the procedure of the bureau would not alter the essential nature of the work the lawyers there were performing from that of a judicial nature. Or, the work of the bureau might be looked at in another light. It might be said that the work of the lawyers in the bureau alone is merely the preparation and simplification of the cause for the hearing in the court. They are thus analogous to the assistants of the judge of our Probate Court, or Masters in Chancery, or Referees. It must not be forgotten that through the disinterested efforts of the state's lawyers a great many of the causes would be disposed of

amicably, and without the use of execution process. This feature of the plan is one that appeals a great deal to the writer. But in whatever light they are regarded, it might be made the rule, where there is no appeal to the court from their disposition of a case, and it becomes necessary to enforce such disposition by process, that their finding be presented to the court for entry thereof, and judgment and execution theron, much like the confirmation by a court of equity of a master's report. By this method the objection that the lawyer-arbitrators were exercising judicial functions without being a regularly constituted judicial tribunal, would be met; for then the execution debtor could not contend that he was being subjected to the execution process of an extrajudicial tribunal; and his demand for "due process of law" by a judicial tribunal, from the very moment that he is brought in by summons, could be met by the answer that he could have it by the payment of the costs for the trial in the *nisi-prius* court of the "single, certian and material issue" found by the lawyer-arbitrators, and that his non-payment for such trial logically amounts to the same as his default for non-appearance after service of process by summons today, upon which default a judgment is rendered in our practice.

But even should constitutional changes be required, the question, after all, is, would the plan be of such promise in bringing about a correction of the abuses in our system of law as to make such constitutional changes worth while? It is a matter for pleasant reflection that today, even lawyers are coming to have less horror of a change, merely because it is a change, and are ready to investigate innovations on their merits. The criticism which I can fancy most persons making is that the idea is decidedly socialistic; but the time has passed when that of itself is considered a valid objection. We are undoubtedly going through social changes to conditions where almost every phase of society will assume some so-called socialistic form. Until, in the evolution of society, men will have reached that state where the amount of litigation would be negligible, the above complaint is not a valid objection to a plan of handling law-suits in even some socialistic form, if the plan will dispose of litigation quickly, justly and efficiently.